No. 94-1247

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,

Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,

Respondent.

NIGHTTIME CONCEPTS, INC.,

Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,

Respondent.

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v.

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Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Twenty-first Amendment confers an added presumption of validity upon Pennsylvania's alcohol price advertising ban and shields such ban from a commercial speech balancing test review?

2. Whether First Amendment protection of commercial speech applies to Pennsylvania's alcohol price advertising restriction in light of Pennsylvania's absolute power to totally ban the sale of alcohol?

3. Whether advertising proscriptions of products such as alcoholic beverages, which can be totally prohibited by the state, pass muster under the *Central Hudson* commercial speech test as a matter of law so long as the restrictions are reasonably related to the governmental purpose in limiting consumption?

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The respondent, Pennsylvania State Police, Bureau of Liquor Control Enforcement, respectfully requests that

this Court deny the Petition for Writ of Certiorari submitted by petitioners.

STATEMENT OF THE CASE

A. Procedural History and Proceedings Below

The respondent, Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), is the agency responsible for enforcing the Liquor Code, Pa. Stat. Ann. tit. 47 §§ 1-101, *et seq.* Petitioners are holders of restaurant liquor licenses issued by the Pennsylvania Liquor Control Board ("Board"). Each of the petitioners had advertised, in a local newspaper, the prices of alcoholic beverages offered for sale in its licensed establishment.[1] In response, the Bureau issued non-criminal administrative citations to each petitioner. The Bureau charged petitioners with violating Section 498 of the Liquor Code, which prohibits the advertisement of the price of any malt beverage, cordial, wine or distilled liquor offered for sale in this Commonwealth.[2]

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[1] As an illustration, the advertisement at issue in *Hospitality II* stated in part: "No cover and 50¢ drinks for the ladies, 10 to 12 midnight." See App. to Pet. for Cert. (hereinafter "App."), 38a.

[2] This prohibition applies to all manufacturers, wholesalers, *retailers*, shippers and Pennsylvania licensees. See Section 498(a). Petitioners recognize that the Pennsylvania Liquor Control Board is a *retailer* of wine and distilled liquor. Pet. for Cert., pp. 4, 16. However, petitioners assert that the Board is exempt from the purview of Section 498. No Pennsylvania court has agreed with petitioners' conclusion.

Evidentiary hearings relative to the citations were held before an Administrative Law Judge ("ALJ"). The petitioners did not contest the fact that the advertisements violated Section 498, but relied solely on the argument that Section 498 abridged their First Amendment rights of commercial speech. The ALJ issued adjudications finding that each petitioner had violated Section 498. The ALJ noted that although she did not have the authority to address petitioners' constitutional challenge, Section 498 was born in the legislature out of a belief that price advertising promoted consumption and that promoting consumption of alcohol was inconsistent with the Liquor Code's purpose of restraining the sale of liquor. App. 43a.

Petitioners appealed to the Board. In dismissing the appeals, the Board recognized that it did not have the authority to constitutionally interpret its own statutes. However, the Board concluded that "promoting consumption through off-premise (sic) advertising is inconsistent with the purpose of the Liquor Code in restraining the sale of liquor." App. 33a, 35a.

Petitioners appealed to the Court of Common Pleas of Philadelphia County, Pennsylvania. The Court held that Section 498 violated the Pennsylvania Constitution but did not address the First Amendment issue. The Bureau appealed to the Commonwealth Court of Pennsylvania and the cases were transferred to the Supreme Court of Pennsylvania.

The Pennsylvania Supreme Court, relying on three decisions by this Court, held that Pennsylvania's price advertising ban as set forth in Section 498 did not abridge

any First Amendment rights to commercial speech. *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, ___ Pa. ___, 650 A.2d 854 (1994) ("*Hospitality*"). The Pennsylvania Supreme Court agreed with the Liquor Control Board that Section 498 was consistent with the purpose of the Liquor Code in restraining the sale of liquor. App. 4a.

Two separate dissenting opinions were authored by Justices Flaherty and Castille. Neither of the dissenting Justices found that Pennsylvania's price advertising ban violated petitioners' First Amendment rights to commercial speech. Justice Flaherty stated that "there may be no federally protected right of commercial speech on the facts of this case under the First Amendment to the United States Constitution. . . . " App. 15a. In his dissenting opinion, Justice Castille advocated the application of a *Central Hudson* analysis. He was troubled with the Bureau's failure to introduce, at the common pleas court level, empirical evidence to support the link between alcohol price advertising and consumption. App. 12a-13a. Justice Castille would have remanded the case to the trial court to allow the Bureau the opportunity to present evidence relative to the third and fourth prongs of the *Central Hudson* test. App. 13a.

B. The Legislative History of Section 498.

Section 498 was added to the Pennsylvania Liquor Code in 1987. This amendment was co-sponsored by State Senators Madigan and Wilt. Upon offering this alcohol

price advertising restriction for the legislature's consideration, Senator Madigan summarized its purpose as follows:

> Many people in the Bible Belt of this state who support liquor control feel that such advertising would have an impact on the consumption of alcohol and, therefore, I am pleased to urge support for this amendment. Pa. Senate, Legis. J, June 17, 1987; App. 88a.

Petitioners misstate the legislative history when they assert that Section 498 was adopted for the purpose of economic protectionism. Pet. for Cert., pp. 4, 16, 19. While a single state senator, who asked for permission to become a co-sponsor of the bill after it had already been introduced onto the floor, expressed his concern for small distributors as an ancillary reason for passage, App. 89a, it is clear that the primary purpose of Section 498 as stated by Senator Madigan was to restrain and discourage the consumption of alcoholic beverages.

Petitioners' statement that the "government" of Pennsylvania expressly concluded in 1985 that there is no casual connection between price advertising and consumption is misleading and erroneously based upon documents not of record in this case. Pet. for Cert. pp. 5, 20. Pennsylvania's legislative body, the General Assembly, has *never* concluded that there is no link between price advertising and excessive consumption. As set forth above, the Pennsylvania legislature reached the opposite conclusion through its enactment of Section 498. The non-record information relied upon by petitioners shows that in 1985, the Antitrust Section of the Pennsylvania Attorney General's Office hired *one* expert who prepared a

report concluding that the disadvantages of *beer* price advertising are minimal. App. 58a. This report was never considered or adopted by the Pennsylvania legislature.

Petitioners' reference to the 1985 Liquor Control Board Order rescinding a Board regulation that had prohibited beer price advertising by certain license holders is also misleading and based upon documents not of record in this case. Moreover, in reviewing the challenge to Section 498 in the instant cases, the Pennsylvania Liquor Control Board specifically concluded that promoting alcohol consumption through off-premises price advertising is inconsistent with the Code's purpose of discouraging the sale of liquor.[3]

SUMMARY OF ARGUMENT

The decision of the Pennsylvania Supreme Court is consistent with the approach taken by this Court in several prior decisions wherein liquor related regulations were challenged on First Amendment grounds. Additionally, numerous federal courts of appeal and state courts of last resort have rejected commercial speech challenges to alcohol advertising restrictions. The decision of the Pennsylvania Supreme Court is in accord with

[3] The Bureau objects to the inclusion of the Attorney General's report and to the Liquor Control Board Order in the Petition for Writ of Certiorari. These documents were never introduced as evidence or made part of the record below.

the ultimate result reached by these state and federal courts and follows the reasoning employed by this Court.

REASONS FOR DENYING THE WRIT

I.

THE PENNSYLVANIA SUPREME COURT'S HOLDING THAT PENNSYLVANIA'S ALCOHOL PRICE ADVERTISING BAN NEED ONLY BEAR A REASONABLE RELATION TO THE PURPOSE OF THE PENNSYLVANIA LIQUOR CODE IN ORDER TO SURVIVE A FIRST AMENDMENT COMMERCIAL SPEECH CHALLENGE IS CONSISTENT WITH THE REASONING APPLIED BY THIS COURT IN SEVERAL PRIOR DECISIONS

Contrary to the assertions of petitioners, the reasoning applied by the Pennsylvania Supreme Court in dismissing petitioners' First Amendment attacks is not novel or remarkable. The Pennsylvania Supreme Court followed the approach taken by this Court in three prior decisions wherein liquor related statutes or regulations were challenged on First Amendment grounds.

The Pennsylvania Court held that the cases of *California v. LaRue*, 409 U.S. 109 (1972) ("*LaRue*"), *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) ("*Bellanca*"), and *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986) ("*Iacobucci*"), clinched the argument for reviewing the advertising restriction under a reasonable relation standard as opposed to applying a *Central Hudson* balancing test. App. 5a.

In *LaRue*, *Bellanca* and *Iacobucci*, proprietors of establishments licensed to sell liquor contended that state or

local regulations prohibiting sexual entertainment or topless dancing in licensed premises deprived them of their rights under the First Amendment to the United States Constitution. Nude or topless dancing has been recognized by this Court as a form of expressive activity protected by the First Amendment. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). Although First Amendment challenges normally require a careful balancing of competing interests,[4] this Court refused to adopt such an approach in *LaRue, Bellanca* and *Iacobucci* ("*LaRue, et al.*"). In each of those cases, this Court shielded the liquor regulation in question from full First Amendment review. The Court rejected the free speech claims by finding that the Twenty-first Amendment confers an added presumption of validity in favor of a liquor regulation and that a state legislature or regulatory agency is entitled to enact reasonable restrictions in the liquor area in order to advance the asserted governmental interests.

The Pennsylvania Supreme Court followed the approach taken by this Court in *LaRue, et al.* and declined to apply the commercial speech analysis as set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), noting that commercial speech is generally accorded less protection than other forms of expression. See *U.S. v. Edge Broadcasting Co.*, 113 S.Ct. 2696, 2703 (1993) ("*Edge*"). As noted by the

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[4] See *Schad v. Mount Ephraim*, 452 U.S. 61 (1981); *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*"); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In *Barnes* a *non-liquor* regulation restricting nude dancing was challenged on First Amendment grounds. This Court applied the four-part balancing test as enunciated in *O'Brien*.

Pennsylvania Supreme Court, it would be illogical "to apply a rigorous First Amendment analysis where a liquor regulation is attacked on commercial speech grounds when such an analysis has not been utilized relative to speech which is usually accorded greater protection."[5] App. 5a.

Petitioners' argument that the Pennsylvania Supreme Court erred in expanding *LaRue, et al.* to a restriction on commercial speech is misplaced. Such a position erroneously reads this Court's trilogy of cases too narrowly and restrictively. The approach taken in *LaRue, et al.* is not limited solely to restrictions on sexual entertainment and topless dancing. The basis underlying the Court's holdings in *LaRue, et al.* was not the nature of the activity proscribed by the regulation, but rather the Twenty-first Amendment and the added presumption of validity which that Amendment confers on restrictions in the liquor area. In *LaRue, et al.*, this Court never qualified or confined the Twenty-first Amendment's broad sweep only to restrictions involving sexually related entertainment, dancing or expressive conduct. To the contrary, this Court's statements in *LaRue, et al.* make it clear that the presumptive effect of the Twenty-first Amendment extends to any and all reasonable liquor regulations. "Consideration of *any* state law regulating intoxicating

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[5] Even if expressive conduct does not occupy a greater position than commercial speech on the scale of First Amendment values, surely commercial speech of a product which a state can totally ban should not be afforded any greater protection than expressive conduct.

beverages must begin with the Twenty-first Amendment. . . . " *LaRue,* 409 U.S. at 114, (quoting *Joseph E. Seagram & Sons v. Hostetter,* 384 U.S. 35, 41 (1966)) (Emphasis added). "It is equally well-established that a state has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold." *Bellanca,* 452 U.S. at 715. "[T]he case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment. . . . " *LaRue,* 409 U.S. at 115. "Given the added presumption in favor of the validity of the . . . regulation in this area that the Twenty-first Amendment requires. . . . " *Iacobucci,* 479 U.S. at 97 (quoting *LaRue,* 409 U.S. at 118-119).

In light of this Court's numerous unequivocal references to the presumptive validity of liquor regulations and the absence of any language in *LaRue, et al.* limiting the Twenty-first Amendment's effect to nude dancing restrictions, the Pennsylvania Supreme Court's decision was consistent with this Court's approach whereby a liquor regulation is shielded from a rigorous First Amendment analysis.

The Pennsylvania Supreme Court's approach in concluding that Section 498 bore a reasonable relation to the legislature's goals in this area is also in accord with this Court's actions in *LaRue, et al.* Petitioners' argument that the Bureau offered no expert testimony or empirical evidence to prove that Pennsylvania's ban on alcohol price advertising advances the legislature's goals in this area is misplaced and erroneously relies upon evidence not of

record in this case.[6] Pet. for Cert. pp. 8, 20. In *Bellanca* this Court found that New York's topless dancing restriction was reasonable in the absence of any specific evidence establishing a nexus between the regulation and New York's goals in the area of alcohol control. The Court, in deferring to the legislature's stated purpose for the regulation, stressed that this policy judgment should be upheld as long as it appeared reasonable. *Id.*, at 718. Likewise, in *Iacobucci* the municipality's stated purpose for the restriction as set forth in the preamble to the ordinance was sufficient justification. This Court did not consider it necessary for the city to introduce any evidentiary findings in support of the regulation.

As noted above, the purpose of Pennsylvania's price advertising proscription is to restrain the consumption of alcohol. App. 88a. The purpose of Pennsylvania's regulatory legislation in this area has always been to restrain the sale of liquor. See *Application of El Rancho Grande Inc.*, 496 Pa. 496, 437 A.2d 1150 (1980). Both the ALJ factfinder and the Liquor Control Board, the agency responsible for controlling the sale and consumption of alcoholic beverages in Pennsylvania, recognized that consumption would be promoted through off-premises advertising and that such promotion was inconsistent with the purpose of

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[6] Petitioners contend that the Commonwealth of Pennsylvania has explicitly concluded that beer price advertising does not cause increased consumption. Petitioners rely upon a report prepared by the Antitrust Section of the Pennsylvania Attorney General's Office and upon a Board Order Adopting Regulations, neither of which was introduced into evidence in this case. As set forth above, reference to these documents is inappropriate because they were never made a part of the record below.

the Liquor Code in restraining the sale of liquor. App. 33a, 43a. Given the well-recognized link between the advertising of a product and the increased demand for that product,[7] the Pennsylvania Court properly concluded that the legislature's judgment in enacting Section 498 was reasonable. No explicit evidentiary findings are needed in order to sustain Pennsylvania's ban on price advertising. The Pennsylvania Court's reliance upon the legislature's articulated purpose behind Section 498, which was recognized by the ALJ and the Liquor Control Board, was consistent with this Court's decisions in *Bellanca* and *Iacobucci*.

This Court has ruled in three separate cases that the Twenty-first Amendment confers an added presumption of validity in favor of liquor regulations and such regulations will be upheld if they bear a reasonable or rational link to the government's asserted purpose in enacting the regulations. The Pennsylvania Supreme Court properly relied upon *LaRue, et al.* in addressing petitioners' challenges to Pennsylvania's alcohol price advertising ban. Since the Pennsylvania decision was based upon prior

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[7] See *Central Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.") and *Posadas DePuerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-342 (1986) ("*Posadas*") ("The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised.")

precedent of this Court, review of these cases is not warranted.

II. THE RESULT REACHED BY THE PENNSYLVANIA SUPREME COURT IS CONSISTENT WITH THIS COURT'S BINDING AND CONTROLLING DECISION IN *QUEENSGATE*

Petitioners contend that Pennsylvania's price advertising prohibition violates their right to commercial speech as analyzed under a *Central Hudson* balancing test. However, the argument that an alcohol price advertising ban violates the First Amendment by suppressing commercial speech has already been rejected by this Court by virtue of its summary dismissal in *Queensgate Investment Co. v. Liquor Control Commission*, 69 Ohio St.2d 361, 433 N.E.2d 138, *appeal dismissed*, 459 U.S. 807 (1982) ("*Queensgate*").

In *Queensgate*, a liquor permit holder argued that an Ohio liquor regulation which prohibited off premises alcohol price advertising was an impermissible infringement of its First Amendment right to commercial speech. The Ohio Supreme Court applied the analysis delineated in *Central Hudson* and held that the regulation did not violate the First Amendment. Queensgate filed a timely appeal to this Court. In its Jurisdictional Statement, Queensgate framed the issue as follows:

> Whether Regulation 4301:1-1-44 of the Ohio Liquor Commission, which prohibits a duly licensed retail liquor permit holder from advertising the retail price of alcoholic beverages in any medium visible from outside the premises, violates the First and Fourteenth Amendments

> of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity." Jurisdictional Statement at 1, *Queensgate*.

The Liquor Control Commission filed with the Court a motion to dismiss on the ground that the question was so unsubstantial as not to warrant further argument. This Court subsequently dismissed Queensgate's appeal "for want of a substantial federal question." *Queensgate*, 459 U.S. 807.

This Court has consistently ruled that a summary dismissal of an appeal for want of a substantial federal question is a decision on the merits of a case. *Hicks v. Miranda*, 422 U.S. 332 (1975). Summary dispositions are binding on lower courts and their precedential effect extends to the precise issues presented and necessarily decided by those actions. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*"Mandel"*).

The precise issue presented in *Queensgate*, as articulated in the Jurisdictional Statement, was whether an Ohio liquor regulation, which prohibited a retail license holder from advertising the price of alcoholic beverages in any medium visible from outside the premises, violated the First Amendment because it suppressed commercial speech. The petitioners contend that the statute at issue in the instant cases, Section 498 of the Pennsylvania Liquor Code, which prohibits a liquor license from advertising in any manner whatsoever the price of any alcohol offered for sale, violates their First Amendment rights to commercial speech.

Queensgate and the instant matters involve identical issues. In both cases, there is a liquor regulation prohibiting license holders from advertising in any medium the price of any alcoholic beverages offered for sale. The constitutional challenge in both cases is identical – whether the ban violates the license holder's commercial speech rights.

The Pennsylvania and Ohio courts upheld their respective price advertising bans on the premise that the state acting under its broad powers granted by the Twenty-first Amendment can legislatively conclude that there is a rational link between discount price advertising of a product and the demand for that product. Although the *Queensgate* Court applied a *Central Hudson* test in upholding Ohio's ban while the Pennsylvania Court followed the reasonable relation analysis pursuant to *LaRue, et al.*, this distinction does not take the instant cases out of the *Queensgate* sphere. This Court has stated that a summary disposition has precedential effect, but not necessarily on the identical reasoning of the court. *Mandel*, 432 U.S. at 176. Thus, regardless of the reasoning employed by the Ohio Supreme Court in arriving at its ruling, this Court's *Queensgate* decision stands for the proposition that a state's alcohol price advertising ban does not violate First Amendment commercial speech protection.

This Court's partial reliance on *Queensgate* in its recent decision in *Edge*, 113 S.Ct. at 2707, should erase any doubt as to *Queensgate's* soundness and continued vitality. Moreover, although this Court is not bound by its summary dispositions, *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981), the issue in *Queensgate* need not be revisited because the propriety of *Queensgate*

is buttressed by this Court's decision in *LaRue, et al.*, as discussed herein.[8]

Since the result reached by the Pennsylvania Supreme Court is consistent with this Court's decision in *Queensgate*, full plenary consideration by this Court is not warranted.

III. THE PENNSYLVANIA SUPREME COURT'S HOLDING IS CONSISTENT WITH THE ULTIMATE RESULT REACHED BY ALL STATE COURTS OF LAST RESORT AND ALL FEDERAL APPEALS COURTS THAT HAVE ADDRESSED FIRST AMENDMENT CHALLENGES TO ALCOHOL ADVERTISING RESTRICTIONS

Petitioners urge this Court to consider full review by erroneously arguing that the Pennsylvania Court's "unprecedented holding" aggravates an existing split of authority in the federal and state courts. Pet. for Cert. p. 11.

Petitioners exaggerate the import of the Pennsylvania Supreme Court's decision and rely upon an alleged split of authority that refers more to the manner in which the state and federal courts have arrived at their decisions

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[8] The issue involved in *LaRue, et al.* and *Queensgate* concerned the tension between the First and Twenty-first Amendments. In each of those cases, this Court rejected the argument that a liquor regulation was unconstitutional because such regulation restricted a lesser form of First Amendment speech. Thus, contrary to the petitioners' contention, the authority in this area appears clear and well-settled.

rather than the reasoning employed by these courts and the ultimate holdings.

Numerous federal courts of appeals and state courts of last resort have addressed commercial speech challenges to alcohol advertising restrictions. These courts have consistently upheld the constitutionality of the advertising restrictions at issue.[9] See *44 Liquormart, Inc. v. Rhode Island*, 39 F.2d 5 (1st Cir. 1994); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984) ("*Dunagin*"); *Queensgate, supra; Hospitality, supra.* While each of these courts may have employed slightly different standards in reviewing the challenged regulation, there is a commonality of reasoning which suggests that there is more uniformity in this area than petitioners are willing to admit.

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[9] In support of their claim of a split of authority, petitioners refer to *Michigan Beer and Wine Wholesalers Association v. Attorney General*, 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986), which was not a decision from the Michigan Supreme Court but rather a three judge panel opinion of Michigan's intermediate appellate court. Likewise, *Wise v. Tennessee Alco. Bev. Comm'n*, No. 81-325-I, (Tenn. Ct. App., Apr. 13, 1982), was a three judge panel decision from Tennessee's intermediate appellate court. Petitioners' reliance on *Dunagin* is misplaced because in that case the ultimate holding of eight out of thirteen judges was consistent with the result reached by the Pennsylvania Supreme Court.

First, the state and federal courts have unanimously found that promoting temperance by reducing the demand for alcoholic beverages is a legitimate and substantial governmental purpose. Second, the lower courts have consistently held that restrictions on the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages. This conclusion has not been based upon any evidentiary findings or empirical evidence. Rather the state and federal courts have invariably arrived at this holding after deferring to the judgment of the state legislature or after recognizing the inherent connection between advertising and demand. Third, these courts have found that the legislature's choice of using an advertising restriction to achieve its goals of temperance is a reasonable one. Fourth and most importantly, the highest state courts and federal appeals courts have uniformly held that an advertising restriction does not violate commercial speech rights.

As set forth above, there is a surprising unanimity in the conclusions reached by the state and federal courts on the fundamental issues involved when an alcohol price advertising restriction is challenged on commercial speech grounds. Moreover, the Pennsylvania Court's approach is not so much a departure from the approach taken by these other courts as it is a rearrangement of the same essential inquiry. As is done in a case involving a commercial speech analysis, the Pennsylvania Supreme Court looked at the asserted governmental interest underlying Section 498, determined that it is intended to restrain and discourage the consumption of alcoholic beverages, and found this to be "a legitimate legislative purpose." App. 4a.

The last two steps of a *Central Hudson* analysis focus on whether the regulation directly advances the governmental interest asserted and whether it is more extensive than necessary. These last two steps of the *Central Hudson* analysis basically involve a consideration of the "fit" between the legislature's ends and the means chosen to accomplish those ends. The "fit" need not be perfect, only reasonable. *Edge*, 113 S.Ct. at 2704-2705. The Pennsylvania Supreme Court concluded as did the factfinder and Liquor Control Board below that it was reasonable to accept that banning price advertising is consonant with the legislature's purpose of restraining the consumption of alcoholic beverages. The Court noted that the nature of price advertising is to encourage consumption by promoting sales. App. 4a. Consequently, the Court held that Section 498 bore a reasonable relation to the legitimate legislative goals in the area of alcohol control.

The decision of the Pennsylvania Supreme Court and the decisions of the other state and federal appeals courts are consistent in that they are grounded on the absolute power of the states to totally ban the sale of alcoholic beverages pursuant to the Twenty-first Amendment. See *Bellanca*, 452 U.S. at 715. Regardless of the slight differences in the tests or analyses used by the courts in addressing a commercial speech challenge to an alcohol advertising restriction, the ultimate decision upholding the regulation is explicitly or implicitly premised on the theory that a state's power to totally ban the sale of

alcohol includes the lesser power to dampen demand by placing restrictions on advertising.[10]

In *Posadas* this Court specifically referred to this theory and emphasized that it is because the government could have enacted a wholesale prohibition on the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct but reducing the demand through restrictions on advertising. This Court noted that it would be a strange constitutional doctrine which would concede to the legislature the authority to ban a product but deny to the legislature the authority to forbid the stimulation of demand for the product by advertising.

> Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages and prostitution, has varied from outright prohibition on the one hand (citations omitted), to legalization of the product or activity with restrictions on stimulation of its demand on the other hand (citations omitted). To rule out the latter, intermediate kind of response would require more than we find in the First Amendment. 478 U.S. at 346-347.

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[10] In *Dunagin* two judges agreed with the result reached by the majority but could not join in the majority opinion because of the majority's reliance on the Twenty-first Amendment in giving the alcohol advertising restriction at issue a substantial amount of deference. The concurring judges stressed that the regulation should be upheld on Mississippi's broad "police power". However, the concurring opinion concluded by stating that since "states can ban the sale of liquor entirely," they can place "restriction(s) on commercial exploitation by way of advertising. . . . " *Dunagin*, 718 F.2d at 754-755.

Since the decision of the Pennsylvania Supreme Court is consistent with the reasoning of this Court in *Posadas*, there is no compelling reason for the grant of certiorari.

CONCLUSION

For the reasons set forth herein, the Pennsylvania State Police, Bureau of Liquor Control Enforcement respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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